

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MENOMINEE INDIAN TRIBE	)	
OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case Number: 1:07cv00812
	)	
UNITED STATES OF AMERICA,	)	Hon. Reggie B. Walton
MICHAEL O. LEAVITT, Secretary	)	
of the Department of Health and	)	
Human Services, and CHARLES W.	)	
GRIM, Director of the Indian Health	)	
Service	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' MOTION TO DISMISS**

Defendants hereby move pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss Plaintiff's Complaint. The reasons for this motion are set forth in the accompanying memorandum of law.

Dated: Aug. 15, 2007

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

SHEILA M. LIEBER  
Deputy Branch Director

Of Counsel:

MARIAN C. NEALON  
CLAIRE D. DE CHAZAL  
Assistant Regional Counsel  
U.S. Department of Health and  
Human Services  
Office of General Counsel, Region V  
233 North Michigan Avenue - Suite 700  
Chicago, IL 60601  
voice: (312) 886-1693  
fax: (312) 886-1718

/s/ Tamara Ulrich  
TAMARA ULRICH (NY Bar)  
Trial Attorney  
U.S. Department of Justice, Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., N.W.  
P.O. Box 883  
Washington, D.C. 20044  
voice: (202) 305-1432  
fax: (202) 616-8470  
  
Attorneys for Defendants

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**MEMORANDUM OF LAW IN SUPPORT  
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Federal Programs Branch  
20 Massachusetts Ave., N.W.  
P.O. Box 883  
Washington, D.C. 20044  
voice: (202) 305-1432  
fax: (202) 616-8470

Attorneys for Defendants

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## INTRODUCTION

Plaintiff Menominee Indian Tribe of Wisconsin entered into contracts with the government to provide certain health care services to tribal members pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (“ISDA”). After performing under these contracts for many years and renewing its contracts numerous times, Plaintiff has brought breach of contract and breach of trust claims to recover additional funds for indirect contract support costs in contract years 1995 through 2004. Relying on snippets of language from the ISDA, Plaintiff alleges various theories through which it claims it should have been awarded additional money under its government contracts. The bottom line, however, is that the contracts themselves (to which Plaintiff agreed) specified dollar amounts that would be paid to Plaintiff for indirect contract support costs. As Plaintiff concedes in its complaint, the government paid indirect contract support costs in an amount equal to the amounts specified in those contracts. Because the government paid Plaintiff in accordance with the express terms of the contracts, there has been no breach of contract and Plaintiff’s claims must be dismissed for failure to state a claim.

As a threshold matter, several years of Plaintiff’s claims are time-barred. Plaintiff did not meet the applicable statute of limitations for three of the contract years at issue (1996 through 1998), which this Court has noted is jurisdictional. See Tunica-Biloxi Tribe of Louisiana v. United States, No. 02-2413, slip op. at 10 (D.D.C. Dec. 9, 2003). Therefore, this Court lacks jurisdiction over claims for those years. Similarly, Plaintiff unreasonably delayed for over eleven years in bringing its claims for contract year 1995. As such, claims for that year are barred by laches.

In addition to the fact that the government fully performed under the express terms of the contracts, Plaintiff's claims for additional contract support costs have been waived as a matter of law and Plaintiff is estopped from raising such a claim. Finally, Plaintiff's breach of trust claim must also be dismissed for failure to state a claim. There is no cognizable trust duty that Plaintiff alleges has been breached by the government. In any event, Plaintiff's breach of trust claim for monetary damages is untenable because the government has not waived sovereign immunity for this claim.

### **STATUTORY BACKGROUND**

Congress enacted the ISDA to allow Indian tribes to contract with the federal government to operate many of the programs which the government previously operated for the benefit of Indians, through what is termed a self-determination contract. The ISDA has the stated purpose to "permit an orderly transition from Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). To achieve these policy objectives, the ISDA provides a framework for the orderly transfer of the administration and operation of traditionally government-run programs to the Indian people. A primary means for achieving this transfer is the self-determination contract.

Section 450f(a)(1) of the ISDA directs the Secretary of Health and Human Services ("the Secretary" or "HHS"), "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and

administer programs or portions thereof . . . ." 25 U.S.C. § 450f(a)(1).<sup>1</sup> Each ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1995, annual funding agreements ("AFAs"). See id. § 450l (providing for a model contract); id. § 450l(c)(e)(2) (providing for written modifications to the contract); id. §§ 450l(c)(b)(4), (c)(f)(2) (providing for an AFA). The funding levels for an ISDA contract are generally described in the AFA.

Although many self-determination contracts remain in effect for more than one year, Tribal contractors must submit AFA proposals each year, which are then subject to individualized negotiations between the Secretary and the contractor. See id. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. If the parties are unable to agree on the appropriate funding level, the Secretary can decline the proposal in part or in full. The Tribal contractor has the right either to seek review of a declination through the administrative appeals process or by a direct federal court action. See 25 U.S.C. § 450f(b).

There are two types of funding for each ISDA contract. First, the tribal contractor receives the amount the Secretary "would have otherwise provided for the operation of the programs" ("Secretarial amount"), which "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs." 25 U.S.C. § 450j-1(a)(1). Second, it receives contract support costs ("CSC"). Id. § 450j-1(a)(2).

CSC can be broken down into three categories. See id. § 450j-1(a)(3)(A). First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment

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<sup>1</sup> The statute also applies to certain (non-healthcare) services provided to Native Americans by the Department of Interior and the Secretary of Interior by the Interior's Bureau of Indian Affairs ("BIA"). However, BIA contracts are not at issue in this case.

taxes or workers' compensation insurance. See id. § 450j-1(a)(3)(A)(i); id. § 450b(c). Second, in the initial year of a contract, CSC may include "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis." Id. § 450j-1(a)(5). Finally, there are indirect CSC, which are administrative costs that are shared by several different programs or services. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). Indirect CSC are the only funds at issue in this lawsuit. See Compl. ¶¶ 2, 3, 17.

The ISDA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See id. § 450j-1(b). The ISDA directs that the ISDA appropriations of the Indian Health Service ("IHS"), the component agency of HHS that is responsible for the operation and administration of healthcare programs for Native Americans and for entering into ISDA healthcare contracts, "may be expended only for costs directly attributable to [ISDA contracts or grants] and no funds . . . shall be available for any [CSC] associated with [any non-IHS contracts or grants]." Id. § 450j-2. Finally, IHS's payment of CSC, like all funding under the ISDA, is subject to the availability of appropriations. See id. § 450j-1(b); id. § 450j(c).

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff is a federally recognized Indian tribe that has contracted with the United States pursuant to the ISDA to provide health care services to members of the tribe and other beneficiaries. Compl. ¶ 10. Plaintiff has a contract under which AFAs are negotiated pursuant to the ISDA. Id. Plaintiff brings this action under the Contract Disputes Act, 41 U.S.C. § 601 et seq. ("CDA"). Id. ¶ 1. Specifically, Plaintiff alleges that the government breached its ISDA contracts with it for the contract years 1995 through 2004 by underpaying indirect CSC. Plaintiff maintains several theories of recovery. Plaintiff's first claim is a "shortfall claim," which alleges

that IHS should have reprogrammed money from its lump-sum appropriation to pay the “full amount” of indirect CSC when there was a shortfall in funding for each fiscal year. Id. ¶¶ 22-25, 37-41. Plaintiff’s second claim is a “miscalculation” claim, in which Plaintiff alleges that the defendants used a “flawed . . . rate calculation methodology” in establishing indirect CSC. Id. ¶¶ 26-33, 42-44. Plaintiff’s third claim is that the defendants “breached the stable funding requirements of [ISDA] section 106(b)” by paying less than \$404,938 for fiscal years 1998 through 2000. Id. ¶¶ 34-36, 45-46. Plaintiff’s fourth claim is for breach of trust because the Secretary “failed to take all steps necessary to fully fund the Tribe’s contracts.” Id. ¶ 48.

Pursuant to the CDA, which requires that contract claims against the government first be submitted to the contracting officer for a decision, see 41 U.S.C. § 605(a), Plaintiff submitted its claims to the Indian Health Service in September 2005 for fiscal years 1995 through 2004. See Compl. ¶ 8.<sup>2</sup> IHS denied the claims for all years. Id. ¶ 9. Plaintiff alleges that it received IHS’s denials of Plaintiff’s claims on May 5, 2006 and May 10, 2006. Id. ¶ 9. Plaintiff filed the instant action on May 3, 2007.

### **STANDARD OF REVIEW**

Rule 12(b)(1) permits a defendant to move to dismiss a claim on the ground that the court lacks jurisdiction over the subject matter. Where necessary, “the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” Herbert v. Nat’l

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<sup>2</sup> Plaintiff states that it submitted its claims on September 7, 2005. IHS records indicate that Plaintiff’s letters regarding contract years 1995 through 2000 were dated September 7, 2005 and that its letters to IHS for contract years 2001 through 2004 were dated September 9, 2005. For the purposes of this motion to dismiss, Defendants will accept Plaintiff’s allegations regarding the dates of the letters as true.

Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). Accordingly, a motion to dismiss for lack of jurisdiction that relies on matters outside the pleadings, such as a declaration or other documents, should not be converted to a Rule 56 motion for summary judgment. See Fed. for Am. Immigration Reform, Inc. v. Reno, 897 F. Supp. 595, 600 n.6 (D.D.C. 1995), aff'd, 93 F.3d 897 (D.C. Cir. 1996). Defendants assert that this Court lacks jurisdiction over Plaintiff's claims for contract years 1996 through 1998, because the jurisdictional statute of limitations for those claims has expired. Defendants move to dismiss all claims for contract years 1996 through 1998 under Rule 12(b)(1) of the Federal Rules of Civil Procedure because the jurisdictional statute of limitations has expired for those claims.

Defendants also assert that Plaintiff has failed to state a claim with respect to each contract year at issue, and move to dismiss all claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A motion to dismiss for failure to state a claim should be granted where the complaint fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court may grant a Rule 12(b)(6) motion when a complaint does not contain allegations that support recovery under a viable legal theory. Bell Atlantic Corp. v. Twombly, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1955, 1969 (2007). In deciding a motion to dismiss under Rule 12(b)(6), a court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." EEOC v. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). Because the contracts are central to Plaintiff's allegations and are referenced in the Complaint, see Compl. ¶¶ 2, 3, 7, 10, 25, 39, 41, 46, they are incorporated therein. See Kaempe v Myers, 367 F.3d 958, 965 (D.C. Cir. 2004); Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993).



## ARGUMENT

### **I. BECAUSE THE STATUTE OF LIMITATIONS HAS PASSED FOR PLAINTIFF'S CLAIMS TO FUNDS FROM CONTRACT YEARS 1996, 1997, AND 1998, THIS COURT LACKS JURISDICTION OVER THOSE CLAIMS**

The Contract Disputes Act governs Plaintiff's claims. See Compl. ¶ 7; 25 U.S.C. § 450m-1(d); 41 U.S.C. § 609(a). The CDA is a waiver of sovereign immunity and the time limitations found therein operate as conditions on that waiver. James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996). Statutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them. Bowles v. Russell, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2360, 2366 (2007); see also See Tunica-Biloxi Tribe, No. 02-2413, slip op. at 10 (Dec. 9, 2003). In 1994, Congress enacted a six-year statute of limitations for Contract Disputes Act claims. 41 U.S.C. § 605(a) ("Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim."). Because Plaintiff did not raise claims related to its 1996 through 1998 CSC funding within six years of their accrual, these claims must be dismissed for lack of subject matter jurisdiction.

Plaintiff signed contract number 239-96-0030, which covered contract years 1996 through 1998, on December 21, 1995, see Ex. B at 11, and subsequently signed AFAs for those contract years. Because these documents were signed after the passage of the CDA's statute of limitations, this statute of limitations applies to this contract and its related AFAs.

At the latest, Plaintiff's contract claims accrued by the end of each contract year (which correspond with the calendar year). See Oceanic S.S. Co. v. United States, 165 Ct. Cl. 217, 225 (1964) (per curiam) ("A claim against the United States first accrues on the date when all the

events have occurred which fix the liability of the Government and entitle the claimant to institute the action. Therefore, where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract.”) (internal citations omitted). Plaintiff’s claims under the 1996 contract accrued by the end of December 1996, and the statute of limitations on these claims expired by the end of December 2002. Plaintiff’s claims under the 1997 contract accrued by the end of December 1997, and the statute of limitations on these claims expired by the end of December 2003. Plaintiff’s claims under the 1998 contract accrued by the end of December 1998, and the statute of limitations on these claims expired by the end of December 2004. By its own admission, Plaintiff did not submit any of its claims for contract years 1996 through 1998 to the contracting officer until September 7, 2005. See Compl. ¶ 8. This falls well outside of the CDA’s six-statute of limitations period. Consequently, the Court lacks jurisdiction over those claims.

## **II. LACHES APPLIES TO PLAINTIFF’S CLAIMS FOR CONTRACT YEAR 1995**

Arguably, the CDA statute of limitations does not apply to Plaintiff’s 1995 contract because it was signed prior to the passage of the CDA statute of limitations. However, the doctrine of laches should apply. “Laches applies where there has been an unfair and prejudicial delay by a plaintiff in bringing an action.” CarrAmerica Realty Corp. v. Kaidanow, 321 F.3d 165, 171 (D.C. Cir.), op. supplemented by 331 F.3d 999 (D.C. Cir. 2003). Laches applies when: (1) there is an unreasonable and inexcusable delay from the time the claimant knew or reasonably should have known about its claim; and (2) that this delay caused either economic prejudice or injury to the defendant’s ability to mount a defense. A.C. Aukerman Co. v. R.L. Chaides Constr.

Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992); Cornetta v. United States, 881 F.2d 1372, 1377-78 (Fed. Cir. 1988). Both of these elements are met here.

First, Plaintiff delayed more than eleven years before bringing this lawsuit. Plaintiff's cause of action accrued by December 1995 at the latest, when the contract year ended and Plaintiff had been fully paid under the contract. Plaintiff was fully aware at this time of its payment under the contract – if it had disputes regarding the amount of payment, it could have brought suit immediately. This 11-year delay is nearly double the current statute of limitations, and is certainly long enough to meet the standards under the first prong of the test for laches. See Mexican Intermodal Equip., S.A. v. United States, 61 Fed. Cl. 55, 71 (2004) (noting delays ranging from 3½ to 5 years can constitute unreasonable delay).

Second, Defendants have been economically prejudiced by this delay, as the appropriations for 1995 have long since lapsed. Congress appropriated money to IHS for Indian Health Services, available for one year. See Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536, 2537-38 (1994). Congress specifically stated in the Appropriations Act that “[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.” Id., 108 Stat. at 2536. By law, IHS funds for ISDA contracts had to be obligated within the appropriation year. Id., 108 Stat. at 2528. Therefore, by the terms of the Appropriations Act itself, this funding has long since expired, and to allow Plaintiff to revive a claim for appropriations that expired over a decade ago would be extremely prejudicial to

Defendants.<sup>3</sup>

### **III. THIS CASE SHOULD BE DISMISSED BECAUSE DEFENDANTS FULLY PERFORMED UNDER PLAINTIFF'S CONTRACTS**

The foundation of Plaintiff's complaint is that Defendants breached the contracts they maintained with Plaintiff by failing to pay the full contract support costs owed to Plaintiff. See Compl. ¶ 1, 2. However, a review of the contracts demonstrates that none of the contracts has been breached. To the contrary, Defendants fully performed all of its obligations under the express terms of the contracts at issue.

The Supreme Court has recently interpreted the nature of ISDA contracts, and has held that ISDA contracts are to be interpreted like any other contract, holding the parties to the explicit terms of the contract. Cherokee Nation v. Leavitt, 543 U.S. 631, 639, 125 S. Ct. 1172, 1178 (2005). In Cherokee Nation, the government argued that ISDA contracts were unique, government-to-government agreements to which general contract law did not apply. Id. at 638, 125 S. Ct. at 1178. The Supreme Court rejected this argument, finding nothing in the statutory language that warranted such special treatment of ISDA contracts and finding that "Congress, in respect to the binding nature of a promise, meant to treat alike promises made under the Act and

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<sup>3</sup> This is particularly true because the 1995 contract contained a limitation of cost provision, which specified the total cost to the government would not exceed \$4,623,969. See Ex. A at 004, 016. This provision limits the government's liability to that amount, and the government should have been able to rely on the fact that it would not need to provide additional funds well into the future. See, e.g., Sociotechnical Research Applications, Inc. v. Whitman, No. 01-1232, 2002 WL 123557, at \*3-4 (Fed. Cir. Jan. 30, 2002) (finding limitation of cost provision limited government's liability for funds allotted in the contract); Advanced Materials, Inc. v. Perry, 108 F.3d 307, 310 (Fed. Cir. 1997) (finding the government's estimated cost a ceiling for its contractual liability when contract contained a limitation of cost provision); Titan Corp. v. West, 129 F.3d 1479, 1482 (Fed. Cir. 1997) (holding the government is not liable for additional costs in the face of a limitation of cost provision).

ordinary contractual promises (say, those made in procurement contracts).” Id. at 639, 125 S. Ct. at 1178 (emphasis in original). Therefore, in order to determine whether there has been a breach of contract, the Court must look to the terms of the contracts and the explicit promises made therein.

The plain language of a contract is controlling. Craft Mach. Works, Inc. v. United States, 926 F.2d 1110, 1113 (Fed. Cir. 1991). As the D.C. Circuit has noted, a contract “must be enforced as written.” Welch v. Sherwin, 300 F.2d 716, 718 (D.C. Cir. 1962). In this case, each of the contracts specified the amount of funding for indirect CSC that the government would provide to Plaintiff, and the government provided the full funding specified in the contracts. Because the government fully performed under the express terms of the contracts (including each AFA), there has been no breach and Plaintiff’s case must be dismissed.

#### **A. Defendants Fully Performed Under the 1995 Contract**

The government entered into contract number 239-95-0018 with Plaintiff to provide for the continued operation and administration by the Tribe of the Menominee Tribal Health Service Program. See Ex A at 003, § C(1).<sup>4</sup> The contract provided funding from January 1, 1995 through December 31, 1995. Payment for indirect CSCs, which is the subject of this lawsuit, is set forth within this contract. Section G(6) lists a line-item figure for indirect CSC (labeled “CSC IDC”) to be paid under the contract as \$300,429. See Defs.’ Ex. A at 007. A subsequent modification to the contract increased this amount by \$31,400. Id. at 012-13. Thereafter, the

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<sup>4</sup> Because of the voluminous nature of the document, Defendants have attached only relevant excerpts of the 1995 contract as Exhibit A. For the remainder of the contract years, Defendants’ exhibits contain the contracts and/or AFAs, without attachments, as well as relevant modifications to the contracts.

government issued a second increase of \$31,400 for indirect CSC. Id. at 015-16. In sum, the total indirect CSC that the government promised for the 1995 contract was \$363,229. This is the exact amount that Plaintiff alleges was paid for indirect CSC under this contract. See Compl.

¶ 25. Because the government paid the entire amount for indirect CSC that was promised to Plaintiff in the contract, there has been no breach of the 1995 contract.

#### **B. Defendants Fully Performed Under the 1996 Contract**

The parties entered into contract number 239-96-0030 for 1996, as well as an Annual Funding Agreement for that year. See Ex. B. The AFA specifies the amounts due to Plaintiff under the contract for 1996. Section 3(a) is labeled “Funds to be Provided” and states that the payment for indirect CSC in 1996 would be \$319,230. See id. at 020. In a subsequent contract modification, \$30,000 was added to the indirect CSC for the 1996 contract. See id. at 028.

Therefore, the total funds contractually promised by the government under the 1996 contract for indirect CSC was \$349,230. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 1996 contract.

#### **C. Defendants Fully Performed Under the 1997 Contract**

Contract number 239-96-0030 continued to apply in 1997, and funding under the contract was governed by an AFA. The AFA for 1997 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 1997 would be \$319,200. See Ex. C at 005. A subsequent modification to the AFA added an additional \$861 to this amount. See id. at 015. Therefore, the total funds contractually promised by the government under the 1997 AFA for indirect CSC was \$320,061. This is the exact amount Plaintiff alleges was paid for indirect CSC

under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 1997 contract.

**D. Defendants Fully Performed Under the 1998 Contract**

Contract number 239-96-0030 continued to apply in 1998, and funding under the contract was governed by an AFA. The AFA for 1998 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 1998 would be \$319,200. See Ex. D at 005. Modification 21 to the AFA contained three additional amounts for indirect CSC: \$498 (labeled CSC/IDC in the modification), \$618 (labeled CSC/IDC in the modification) and \$900 (labeled OEH CSC IDC in the modification). See id. at 016. Therefore, the total amount for indirect CSC under the 1998 contract was \$321,216. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 1998 contract.

**E. Defendants Fully Performed Under the 1999 Contract**

Contract number 239-99-0014 applied in 1999, along with an accompanying AFA. The AFA for 1999 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 1999 would be \$319,200. See Ex. E at 021. There were no modifications that affected the amounts of indirect CSC to be paid in 1999. Therefore, the total amount for indirect CSC under the 1999 contract was \$319,200. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 1999 contract.

**F. Defendants Fully Performed Under the 2000 Contract**

Contract number 239-99-0014 continued to apply in 2000, and funding was governed by an AFA. The AFA for 2000 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 2000 would be \$319,200. See Ex. F at 004. Three contract modifications raised the funding for indirect CSC in 2000: modification 00-15 added \$5,884, modification 00-17 added \$2,173, and modification 00-18 added \$10,890. See id. at 013, 016, 021. Therefore, the total amount for indirect CSC under the 2000 contract was \$338,147. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 2000 contract.

**G. Defendants Fully Performed Under the 2001 Contract**

Contract number 239-99-0014 continued to apply in 2001, and funding was governed by an AFA. The AFA for 2001 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 2001 would be \$338,147. See Ex. G at 005. Two contract modifications raised the funding for indirect CSC in 2001: modification 01-24 added \$69,551 and modification 01-25 added \$9,420. See id. at 016, 019. Therefore, the total amount for indirect CSC under the 2001 contract was \$417,118. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 2001 contract.

**H. Defendants Fully Performed Under the 2002 Contract**

Contract number 239-02-0014 applied in 2002, along with an AFA. The AFA for 2002 contained a “Funds to be Provided” section, stating that the estimated payment for indirect CSC



in 2002 would be \$407,698. See Ex. H at 020. Subsequently modification number 02-8 added \$6,181 for indirect CSC. See id. at 031. Therefore, the total amount for indirect CSC under the 2002 contract was \$413,879. This is the exact amount that Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 2002 contract.

**I. Defendants Fully Performed Under the 2003 Contract**

Contract number 239-02-0014 continued to be in effect for 2003, and funding was governed by an AFA. The AFA for 2003 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 2003 would be \$413,879. See Ex. I at 005. Modification 03-10 subsequently deducted \$60 from this amount. See id. at 016. Therefore, the total amount for indirect CSC under the 2003 contract was \$413,819. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for indirect CSC that was promised in the contract, there has been no breach of the 2003 contract.

**J. Defendants Fully Performed Under the 2004 Contract**

Contract number 239-02-0014 continued to be in effect for 2004, and funding was governed by an AFA. The AFA for 2004 contained a “Funds to be Provided” section, stating that the payment for indirect CSC in 2004 would be \$413,819. See Ex. J at 005. Two contract modifications altered this amount: modification 04-21 deducted \$9,103, and modification 04-25 added \$966. See id. at 016, 019. Therefore, the total amount for indirect CSC under the 2004 contract was \$405,682. This is the exact amount Plaintiff alleges was paid for indirect CSC under this contract. See Compl. ¶ 25. Because the government paid the entire amount for

indirect CSC that was promised in the contract, there has been no breach of the 2004 contract.

#### **IV. THE ISDA DOES NOT ALTER THE CONTRACT ANALYSIS**

Despite the fact that Defendants fully complied with the terms of the contract, Plaintiff asserts a breach because Defendants allegedly did not comply with the ISDA. See Compl. ¶ 2. Such an allegation, however, runs directly contrary to the Supreme Court's holding in Cherokee Nation, which mandates that ISDA contracts be treated as any other procurement contract, where the parties are to rely on the terms and conditions therein. Cherokee Nation, 543 U.S. at 643-45, 125 S. Ct. at 1180-81.

Moreover, the mere fact that the ISDA is incorporated into the contracts does nothing to further Plaintiff's claims of breach. The ISDA does not mandate the payment of a specific amount of indirect CSC or that a specific formula be included in the contract. Rather than providing specific dollar amount for funding, the ISDA requires that the parties negotiate a contract. See e.g., 25 U.S.C. §§ 450b(g); 450j(c). An ISDA contract negotiation starts with a contractor's proposal. See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h). A contract proposal will be accepted if the Secretary agrees to the proposed terms. See 25 U.S.C. § 450f(a)(2). If the Secretary declines the proposal, the Tribe or Tribal organization may: (1) challenge the Secretary's declination in an administrative proceeding or directly in federal court as inconsistent with the ISDA, see id. §450f(b)(3), or (2) acquiesce in the terms offered by the Secretary and accept the contract and funding. If the contractor does not avail itself of immediate review and instead acquiesces in the amount of funding proposed by IHS, the contractor is bound by the negotiated amount in the executed contract. If the contractor determines at a later time that the amount of funding is insufficient, it can suspend operation of

the contract or retrocede the program for lack of funding. See id. §§ 450l(c)(b)(5), 450j(e). In future annual funding agreement negotiations, the contractor may again propose desired terms and if they are rejected by IHS, the contractor can force a declination and obtain review in federal court. The availability of immediate judicial review prior to contract formation demonstrates Congress's intent that a Tribe or Tribal organization must challenge the Secretary's rejection of the proposed amounts at the time of contract formation. The statutory scheme and purpose demonstrates that there is no "independent" right under the ISDA to CSC.

This is the conclusion that was reached in a well-reasoned decision by the Federal Circuit in Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005). In Samish, the Federal Circuit reviewed the ISDA and determined that its funding provisions did not curtail the Secretary's discretion to pay funds, did not set clear standards for the Secretary's payment of funds, did not specify precise amounts to be paid, and did not compel the payment of funds. See 419 F.3d at 1364; see also Pueblo of Zuni v. United States, 467 F. Supp. 2d 1114, 1116-17 (D.N.M. 2006). Therefore, regardless of whether Plaintiff characterizes its claims as "shortfall" claims under the ISDA, see Compl. ¶ 22, or "miscalculation" claims under the ISDA, see Compl. ¶ 33, Plaintiff's theories that the ISDA demands an alternate amount of payment under the contracts must fail. It is the contracts themselves that create an entitlement to CSC, the scope of which is determined under traditional contract principles.<sup>5</sup> See Cherokee Nation, 543 U.S. at

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<sup>5</sup> Even if the Court were to find that the ISDA, as incorporated into the contracts, requires payment in an amount other than that specified in the contract, the Court would still need to resolve conflicting (not ambiguous) provisions in the contracts. Any such conflict should be resolved by reference to contract law directing that a specific provision of a contract governs over a general one. See Hometown Fin. Inc. v. United States, 409 F.3d 1360, 1369 (Fed. Cir. 2005); Hills Materials Co. v. Rice, 982 F.2d 514, 517 (Fed. Cir. 1992). Here, there were specific provisions setting the dollar amounts for indirect CSC, which would govern.

639, 125 S. Ct. at 1178; Samish, 419 F.3d at 1364; Pueblo of Zuni, 467 F. Supp. 2d at 1116-17.

It is clear that, following traditional contract principles, there has been no breach.<sup>6</sup>

**V. THE CASE SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS WAIVED ANY CLAIM TO ADDITIONAL FUNDING**

Even assuming, arguendo, that the ISDA required a specific amount for indirect CSC or prohibited the use of indirect cost rates, Plaintiff has waived (and is therefore estopped from raising) any claim to additional funding because they continuously and knowingly acquiesced to the amounts in their ISDA agreements. Plaintiff's knowing and voluntary acceptance is demonstrated by the fact that (1) it failed in each year to challenge the funding levels and funding terms proposed for its agreements pursuant to the procedures available to it under the ISDA, (2) it executed the relevant agreements year after year, (3) it performed under the agreements, and (4) it accepted funding from the Secretary under the agreements. The Secretary, as a party to these agreements, relied upon the enforceability of their terms, and acted to his detriment in assuming other obligations. Under these circumstances, the law of waiver and estoppel preclude any claims that Plaintiff might raise for additional funding.

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<sup>6</sup> Because the omission of a breach of contract disposes of Plaintiff's claims in their entirety, Defendants base their motion to dismiss on this ground. There are several defenses that Defendant has not raised in the instant motion, but will raise in a motion for summary judgment, if necessary. These include the fact that Plaintiff signed a release waiving all claims for contract years 1996 through 1998, which disposes of all of Plaintiff's claims for these years, see Herson v. Gibraltar Bldg. & Loan Ass'n, 864 F.2d 848, 854 (D.C. Cir. 1989), and the fact that because Congress imposed a statutory cap on CSC in years between 1998-2004 and because IHS has already obligated all but minor amounts of the capped funds, no additional CSC funding can be awarded to Plaintiff for those years. See Babbitt v. Oglala Sioux Tribal Public Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999); Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996).

**A. Plaintiff Has Waived Any Claim to Additional Funding.**

When a government contractor believes that the government has violated a statute by including improper terms or conditions in a government contract, the contractor cannot simply accept the contract and continue contract performance, without protest. To do so effects a waiver of the contractor's claim. See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997) ("The doctrine of waiver precludes a contractor from challenging the validity of a contract . . . where it fails to raise the problem prior to execution, or even prior to litigation."); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (recognizing that acceptance of contract provisions that are different from those in the Constitution or a statute can demonstrate voluntary and knowing waiver of a right); Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 417 (2003) (finding waiver when, inter alia, the contractor bid "over and over" on solicitations containing the same clauses that it challenged as illegal), rev'd on other grounds sub nom., Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); Reservation Ranch v. United States, 39 Fed. Cl. 696, 712 (1997) (holding that party to a government contract waived presumed statutory right by agreeing to contract with contrary term), aff'd on other grounds, 217 F.3d 850 (Fed. Cir. Sept. 9, 1999) (unpublished mem.).

In fact, there is little better evidence of an intent to waive an alleged statutory or regulatory right than (a) not taking advantage of pre-execution remedies, (b) signing a contract, (c) performing the contract, and (d) accepting funds under the contract. See Aleutian Constructors v. United States, 24 Cl. Ct. 372, 384 (1991) ("Continuance of the contract is the most common and clearest case of waiver."); E. Walters & Co. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978) (finding that contractor waived claim that contract violated regulation by

consciously choosing to “fully perform the contract as if there were contemporaneous agreement of the parties on the proper interpretation of the [regulation]”). Courts reviewing claims of waiver of statutory rights have considered whether Congress intended to preclude waiver of any substantive protection. Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 641 (Fed. Cir. 1989). The court in Do-Well explained:

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. (citation, internal quotation marks, and alterations omitted). Cf. Cherokee Nation, 543 U.S. at 641-43, 646 (disfavoring a statutory interpretation that “would undo a binding governmental contractual promise”). The burden to show that Congress intended to preclude waiver is on the party opposing waiver. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 2338 (1987).

Here, Congress provided Tribes and Tribal organizations with a powerful vehicle – the declination action – for immediate federal court review of the Secretary’s decision to decline to fund a contract at the level or under the terms proposed by the Tribe or Tribal organization. See 25 U.S.C. §§ 450m-1(a), 450f(a)(2), 450f(b). For example, if the Secretary declines to accept the funding levels or funding terms proposed by a Tribal contractor, either for purposes of a new self-determination contract or for purposes of an AFA, § 450f(a)(2) of the ISDA provides that the Tribe or Tribal organization can challenge the basis for that “declination” through an administrative process, described in 25 C.F.R. § 900.150-900.176, or directly in federal court. See id. § 450f(b); 25 C.F.R. § 900.31. If a Tribe or Tribal organization chooses to go to federal

court, § 450m-1(a) gives federal courts the power to review a Secretary's declination decision for its compliance with ISDA and, if the decision was in error, to enjoin the Secretary "to reverse a declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. § 450m-1(a). Thus, the typical result of a successful declination action challenging the funding levels offered by the Secretary is an order compelling the Secretary to enter into a contract in conformity with the Tribe or Tribal organization's proposal. In this respect, the Tribe or Tribal organization has every incentive to ensure that the terms and conditions of any contract that it signs embody everything to which it believes it is entitled. By executing agreements that provided for a particular funding level, Plaintiff affirmatively signaled an intent to forego any additional benefits that it now purports to read into the ISDA.<sup>7</sup>

Changing course by seeking relief at this late date and after accepting funding under its agreements, Plaintiff has "retained all options for itself" and "made its calculation entirely in its own favor, without proper consideration of the defendant's position," thus violating the "basic principle calling for fair treatment of both parties." Ling-Temco-Vought, Inc. v. United States, 475 F.2d 630, 638 (Ct. Cl. 1973). See also Mexican Intermodal Equip., 61 Fed. Cl. at 70 ("[The plaintiff] belatedly seeks the benefit of a bargain it did not make, which, if permitted by this

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<sup>7</sup> Additionally, each contract contained a "limitation of cost" provision that stated no additional funds would be provided. See Ex. A at 004 (1995 contract), Ex. B at 007 (1996-1998 contract), Ex. E at 006 (1999-2001 contract), Ex. H at 005 (2002-2204 contract). Since 1996, these provisions allowed Plaintiff to request additional funds in writing and, if the funds were not forthcoming, to suspend performance under the contract. Id. Plaintiff chose not to suspend performance under contracts, but continued performing and entering into subsequent contracts with the government.

court, would tend to undermine the fairness of the procurement process.”<sup>8</sup> Under these circumstances, contractors like Plaintiff that fail to take advantage of ISDA’s declination review procedure and enter into contracts should be held to the four corners of those contracts. They have agreed to these terms, and they accepted funding under these agreements. The existence of the contract and AFAs, as well as both parties performance thereunder, should be deemed sufficient evidence a waiver of any rights or claims that Plaintiffs might have otherwise had under the ISDA.

**B. Plaintiff Is Estopped from Seeking Additional Funding.**

Not only did Plaintiff fail to object – and instead accepted – funding under its AFAs, the Secretary relied to his detriment on the funding levels and funding amounts negotiated by the parties and set forth in the agreements. All pertinent appropriations that might have been available for obligation in Plaintiff’s 1995-2004 agreements (had they challenged the funding levels prior to execution) have lapsed as a matter of law.<sup>9</sup> 31 U.S.C. § 1301(c). Had Plaintiffs

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<sup>8</sup> There are some older cases in which courts have declined to apply waiver or estoppel when a contract was found to be illegal. See, e.g., Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988); MAPCO Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405, 416 (1992), rev’d by implication on other grounds by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005). The court in Hermes compared the two lines of cases and concluded that the cases in which courts declined to apply waiver were cases in which the contractor raised its complaint at contract formation or at an early juncture in the dispute, and in which the government’s illegal contract outweighed the contractor’s wrongdoing. See 58 Fed. Cl. at 413. Neither of these factors are present here to avoid the application of waiver.

<sup>9</sup> Each of the relevant appropriations acts from 1995 through 2004 required IHS to obligate the funds therein within the fiscal year. See Department of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536 (1994) (appropriating funds to IHS to be available within the fiscal year); Omnibus Consol. Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-196 (1996) (appropriating funds to IHS to be available within the fiscal year); Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997)



raised their objections prior to contract execution, the Secretary would have had a full range of options: he could have litigated the issue, he could have attempted to re-negotiate the funding levels with Plaintiff, or he could have agreed to provide additional funds if appropriated funds were available and not already obligated. Further, had Plaintiff raised its claims and been successful years ago, the Secretary necessarily would have obligated additional funds for Plaintiff's agreements and not for other purposes. This would have ensured that the Secretary not exceed the limitations set by Congress and thus circumvent Congress's exclusive power to appropriate funds. See U.S. Const., art. I, § 9, cl. 7.

Conversely, if the Court permits Plaintiff to raise its claims now and if it is successful, the Secretary will be responsible for liquidation of all of the original obligations incurred by the Secretary (in reliance on the funding levels provided to Plaintiffs) as well as the obligations that Plaintiff maintains should now be considered part of Plaintiff's agreements.<sup>10</sup> Plaintiff should be estopped from challenging the terms in its agreements at this late date as it had every opportunity

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(appropriating funds for ongoing CSC to be available to IHS for obligation for one year); Omnibus Consol. & Emergency Supp. Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79, 2681-286 (1998) (appropriating funds for ongoing CSC to be available to IHS for one year); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82, 1501A-190 (1999) (appropriating funds for CSC to be available to IHS for one year); Dep't of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79, 987 (2000) (appropriating funds for CSC to be available to IHS for one year); Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 107-62, 115 Stat. 411, 456, 465 (2001) (appropriating funds for CSC to be available to IHS for one year); Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 108-7, 117 Stat. 11, 260-61, 270 (2003) (appropriating funds for CSC to be available to IHS for one year); Dep't of the Interior & Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1293, 1302 (2003) (appropriating funds for CSC to be available to IHS for one year).

<sup>10</sup> While monetary relief would presumably come from the Judgment Fund, the CDA requires IHS to repay these amounts. See 41 U.S.C. § 612.

– including a wide range of statutory review procedures specifically prescribed for this purpose – to timely attempt to demand more favorable contract terms prior to contract execution.

In a central case explaining estoppel, a government contractor claimed that, by exercising a contract option which, in effect, permitted the government to procure the contractor's product at an extremely low price, the government had violated its own regulations. E. Walters & Co. v. United States, 576 F.2d 362, 368 (Ct. Cl. 1978). The Court held that the contractor was estopped from raising its claim because it had failed to object to the allegedly illegal option at the time of the contract award and instead fully performed the contract. Id. As the Court explained it:

Had plaintiff protested the use of the option provision at the time of award, defendant would have been in a position to either reaffirm its use of the option provision, in apparent disregard of [the regulatory] prohibition, with the further knowledge that it could later be faced with a claim for the [higher] price . . . or it could have elected instead, to [omit the challenged provision but award the contract to the next lowest bidder] . . . . Plaintiff's silence deprived the Government of that relatively painless alternative.

Id.; see also Union Pac. R.R. Co. v. United States, 847 F.2d 1567, 1570 (Fed. Cir. 1988)

(applying equitable estoppel against government contractor that complied with a contract term it later challenged because the government could not be put back in the same position as before the challenge); Hartford Accident & Indem. Co., 130 Ct. Cl. 490, 567 (1955) (finding that contractor was estopped from arguing that contract terms were invalid because it knew the terms and accepted payment under the contract).

In summary, Plaintiff accepted funding from the Secretary for many years under agreements that it now alleges – after all funds obligated in the contract have been provided to it and any additional finds that might have been available to IHS have lapsed as a matter of law – conflict with the ISDA. The doctrines of waiver and estoppel, as well as basic principles of

fairness, dictate that Plaintiff's case be dismissed.

## **VII. PLAINTIFF'S BREACH OF TRUST CLAIM SHOULD BE DISMISSED**

Plaintiff's Fourth Claim alleges that the "Secretary failed to take all steps necessary to fully fund the Tribe's contracts," which constitutes a breach of trust. Compl. ¶ 48. This claim must be dismissed because Defendants have not breached any duties to Plaintiff. As described above, Defendants paid all of the indirect costs specified in the contracts. Therefore, there can be no breach of trust based on the contracts themselves, as Defendants fully performed under the contracts.

To the extent Plaintiff alleges that Defendants had an extra-contractual duty to take additional steps to acquire more funding for Plaintiff's contracts, this Court has already rejected such a claim. See Tunica-Biloxi Tribe of Louisiana v. United States, No. 02-2413, slip op. at 7-8 (D.D.C. Jan. 22, 2004). The Court found that the ISDA imposes no duty on the government to seek additional funding for CSC. See id.; see also Ramah Navajo Sch. Bd., 87 F.3d at 1346 ("Congress clearly included the proviso [of 25 U.S.C. § 450j-1(b)] . . . to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act."). The Court further found that a breach of trust claim is "not redressable because even if the Court concluded that the Secretary had a duty to request additional appropriations, the mere act of compelling him to ask for additional funds does not mean that funds would be appropriated." Tunica-Biloxi, No. 02-2413, Jan. 22, 2004 slip op. at 8.

Plaintiff's breach of trust claim must also be dismissed because Defendants have not waived sovereign immunity for the relief Plaintiff seeks in this claim. "It is elementary that the United States, as a sovereign, is immune from suit save as it consents to be sued . . . and the

terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.” United States v. Mitchell, 445 U.S. 535, 538. 100 S. Ct. 1349, 1351 (1980) (citation and internal quotation marks omitted). Moreover, waivers of sovereign immunity “cannot be implied but must be unequivocally expressed.” Id. Plaintiff seeks damages “in an amount to be calculated by the proof” as a remedy for its breach of trust claim, and relies on the ISDA and CDA as the jurisdictional basis for this claim. Compl. ¶¶ 49, 50. These statutes, however, do not provide for monetary recovery for breach of trust. Rather, the ISDA provides the district court with jurisdiction over civil actions for injunctive relief and for “money damages arising under contracts.” See 25 U.S.C. § 450m-1(a). The government's waiver of sovereign immunity is limited to contract damages under the CDA and not for independent claims of breach of trust. Id. §§ 450m-1(a); 450m-1(d); see also Samish, 419 F.3d at 1367-68 (finding that the ISDA did not “convert the underlying statutory programs into entitlements fairly analogized to a trust corpus”). Because there is no waiver of sovereign immunity for money damages for breach of trust in this Court, any such claim should be dismissed for lack of subject matter jurisdiction.

### CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be granted.

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Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

SHEILA M. LIEBER  
Deputy Branch Director

Of Counsel:

MARIAN C. NEALON  
CLAIRE D. DE CHAZAL  
Assistant Regional Counsel  
U.S. Department of Health and  
Human Services  
Office of General Counsel, Region V  
233 North Michigan Avenue - Suite 700  
Chicago, IL 60601  
voice: (312) 886-1693  
fax: (312) 886-1718

/s/ Tamara Ulrich  
TAMARA ULRICH (NY Bar)  
Trial Attorney  
U.S. Department of Justice, Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., N.W.  
P.O. Box 883  
Washington, D.C. 20044  
voice: (202) 305-1432  
fax: (202) 616-8470

Attorneys for Defendants